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No. 07-_____

In the
Supreme Court of the United States

CONEXANT SYSTEMS, INC.; DWIGHT W. DECKER; ARMANDO GEDAY; ROBERT MCMULLAN; MICHAEL VISHNY; J. SCOTT BLOUIN; BALAKIRSHNAN S. IYER; DENNIS E. O'REILLY,
Petitioners,

v.

HOWARD GRADEN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

GREGORY B. REILLY
LOWENSTEIN SANDLER PC
65 Livingston Avenue
Roseland, NJ 07068
(973) 452-3100

RICHARD A. ROSEN
Counsel of Record
ROBYN F. TARNOFSKY
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

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Counsel for Petitioners

QUESTION PRESENTED

Whether a former participant in a defined contribution plan, who liquidated his plan account before bringing suit, has standing to bring a claim for alleged breaches of fiduciary duty seeking money damages under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), on the theory that it was imprudent for plan fiduciaries to permit investment of plan assets in the stock of the plan sponsor?

RULE 29.6 STATEMENT

Petitioner Conexant Systems, Inc. does not have a parent corporation nor is there a publicly held company that owns ten percent or more of the stock of Conexant Systems, Inc.

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STATEMENT

Petitioners Conexant Systems, Inc. ("Conexant"), Dwight W. Decker, Armando Geday, Robert McMullan, Michael Vishny, J. Scott Blouin, Balakrishnan S. Iyer, and Dennis E. O'Reilly (collectively, "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit ("Third Circuit," "appeals court," or "court of appeals") in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 496 F.3d 291. Petitioners sought rehearing *en banc*, which was denied. The order denying rehearing *en banc* (Pet. App. 25a-26a) is unpublished. The order and opinion of the district court granting petitioners' motion to dismiss (Pet. App. 28a-42a) are also unpublished.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23a-24a) was entered on July 31, 2007. A petition for rehearing *en banc* was denied on September 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Appendix (Pet. App. 43a-44a) reproduces the relevant text of the following provisions of the Employment Retirement Income Security Act of 1978 ("ERISA"): 29 U.S.C. §§ 1002(7), 1002(34), 1132(a)(1)(B) and 1132(a)(2).

STATEMENT OF THE CASE

This case involves claims for breach of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). The district court dismissed the complaint in this action, holding that Respondent lacked standing to assert claims for alleged breaches of fiduciary duty because, as a former plan participant who had cashed out of the relevant plan before filing suit, he was no longer a "participant" within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7). Pet. App. 3a. The court of appeals reversed.

Respondent is a former employee of Conexant. In October of 2004, after he left his job, and several months before he filed suit, Respondent liquidated his account in the Conexant Retirement Savings Plan (the "Plan"). Pet. App. 2a. The Plan is a "defined contribution" or "individual account" plan within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34). Pet. App. 9a. The Plan offers individual accounts for each participant, with benefits paid solely based on amounts contributed to these accounts, adjusted for any investment gains or losses. *Id.*

On August 11, 2005, Respondent filed an amended complaint in the United States District Court for the District of New Jersey, asserting numerous ERISA-based claims. In general, Respondent alleged that, in light of the decline in Conexant's stock price following Conexant's 2003 merger with GlobespanVirata, Inc., Petitioners breached fiduciary duties under ERISA by continuing to allow Conexant stock to be offered as an investment option to Plan participants and failing to divest the Plan of its investments in Conexant stock. Pet. App. 31a.

More specifically, Respondent alleged that Petitioners knew or should have known that, as a result of problems following Conexant's merger with GlobespanVirata, Inc., investments in Conexant stock became imprudent. *Id.* Respondent claims that in light of their supposed knowledge of these problems, Petitioners' failure to eliminate Conexant stock as an investment option for Plan participants and their failure to divest the Plan of its holdings in Conexant stock amounted to a breach of their fiduciary duties under ERISA and caused losses to the Plan. *Id.*

Respondent seeks to recover as monetary damages the difference between (a) the amount that his account would supposedly have been worth if the fiduciaries had divested the Plan of Conexant stock (and eliminated further purchases of that security as an option under the Plan) as of some (unspecified) date on which the fiduciaries allegedly ought to have known that the merger was doomed to failure and (b) the value of his account at the time he cashed out of the Plan. Respondent claims that the damages attributable to the fiduciaries' alleged breach of their duty of care are "benefits"; and that he has a "vested" right to these supposed benefits. Respondent does not, however, allege that the benefits he actually received at the time he cashed out were improperly calculated under the terms of the Plan or that he received less than the full value of his account at that time.

On October 12, 2005, Petitioners moved to dismiss the action, arguing, *inter alia*, that Respondent, as a former plan participant, lacked statutory standing to pursue his claims for alleged breaches of fiduciary duty under this Court's decision in *Firestone Tire & Rubber*

Co. v. Bruch, 489 U.S. 101 (1989), because those claims sought "damages" rather than "vested benefits."

On March 31, 2006, the district court granted the motion to dismiss. Pet. App. 28a-29a.

On July 31, 2007, the appeals court vacated the judgment and remanded to the district court for further proceedings. Pet. App. 23a-24a. The Third Circuit held that Respondent had standing to bring his claims for alleged breaches of fiduciary duty under ERISA because ERISA entitles Plan participants "not only to what is in their accounts, but also to what *should be* there given the terms of the plan and ERISA's fiduciary obligations." Pet. App. 9a. The Third Circuit questioned the utility and applicability of the damages/benefits distinction drawn in *Firestone*, stating that it found that distinction to be "unsatisfying." Pet. App. 13a. It went on to conclude that claims for alleged breaches of fiduciary duties arising out of supposedly imprudent investments of plan assets, at least in the context of defined contribution plans, were claims for benefits due under the terms of the Plan and that Respondent therefore had standing to assert such claims. Pet. App. 22a.

Petitioners filed a petition for rehearing *en banc* seeking reconsideration of the panel's decision that Respondent's claims for alleged breaches of fiduciary duty are claims for vested benefits, rather than damages. That petition was denied on September 5, 2007. Pet. App. 25a-26a. This petition followed.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari for three reasons: (1) the decision of the Third Circuit

conflicts with a decision of this Court; (2) the Third Circuit's decision deepens existing circuit splits over former participant standing and adds to the general confusion among the courts on how to approach the issue of former participant standing; and (3) the legal question decided by the appeals court is one of exceptional importance to the administration of ERISA plans nationwide.

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court held that a former employee has standing to bring claims under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), only if the employee has either (1) a reasonable expectation of returning to covered employment or (2) a colorable claim to vested benefits. *Id.* at 117. The Third Circuit's decision effectively ignored the damages/benefits distinction drawn in *Firestone* in order to hold that Respondent had standing to assert his claims for alleged breaches of fiduciary duty. As such, the Third Circuit's decision cannot be reconciled with this Court's decision in *Firestone*.

The Third Circuit's decision also deepens existing circuit splits on the question of former participant standing. Indeed, the confusion over how to interpret this Court's decision in *Firestone* and the relevant ERISA statutory provisions has led to circuit splits on two distinct questions.

First, the circuits have split on whether former participants without an expectation of returning to covered employment *ever* have standing to assert claims for alleged breaches of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Some circuits, following this Court's decision in *Firestone*,

have held that former participants lack standing to bring such claims because these claims necessarily seek damages, not vested benefits. Other circuits have held that, at least in the context of defined contribution plans, former participants do have standing to bring such claims.

Second, the circuits have split on the proper framework to use in analyzing questions of former participant standing when the participant has no expectation of returning to covered employment. One circuit, in the context of fiduciary duty claims for mismanagement of plan assets, has held that former participants have standing to assert claims for alleged breaches of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) only if the claims seek vested benefits, but not if the claims seek an unascertainable amount of money damages. Other circuits have questioned the damages/benefits distinction and essentially refused to apply it.

The issue presented by this petition is of great importance to sponsors, administrators and fiduciaries of ERISA plans, as well as to plan participants and former participants. The decision of the Third Circuit could expand the potential ERISA liability of plan fiduciaries and could expose them to damages awards to former participants who may have long since cashed out their plan accounts.

The significance of this question is demonstrated by how heavily it has been litigated in the lower courts recently; uncertainty over the proper interpretation of the relevant statutory provisions and this Court's decision in *Firestone* has led to widespread disagreement among the courts. In the last few years

alone, more than twenty different courts, including district courts in nine different circuits, have addressed the exact issue presented here – whether former plan participants with no expectation of returning to covered employment have standing to bring suit under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), for alleged breaches of fiduciary duty arising out of supposed mismanagement of plan assets. Fifteen courts have held that former participants without any expectation of returning to covered employment lack standing to bring such claims. *See infra* n.7. Twelve courts have come out the other way. *See infra* p. 16 & n.6. The issue is currently pending in three additional circuits, *see infra* n.8, and the confusion in the caselaw is likely to continue to lead to conflicting precedents, as former plan participants now routinely file claims for alleged breaches of fiduciary duty under ERISA after drops in company stock price, even if they have cashed out of the relevant ERISA plan before filing suit.

For these reasons and for the reasons set forth more fully below, we respectfully submit that this Court should grant a writ of certiorari to resolve the disagreement among the circuits on this important issue.

I. THE THIRD CIRCUIT'S OPINION CONFLICTS WITH SUPREME COURT PRECEDENT

In *Firestone*, this Court held that a former employee has standing to bring claims under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), *only* if the employee has either (1) a reasonable expectation of returning to covered employment or (2) a colorable claim to vested benefits. 489 U.S. at 117. Respondent here has neither: he concedes the first prong, and he cannot establish the

second because his claims for breach of fiduciary duty under ERISA are not claims for vested benefits.

The Third Circuit held that a participant's vested benefits in an individual account plan are the contents of his account, including contributions (from both the participant and employer) plus investment gains minus investment losses and any allocable expenses, unencumbered by any fiduciary impropriety. Accordingly, the court of appeals held that Respondent has statutory standing to bring a claim seeking the amount his account supposedly would have been worth in the absence of any fiduciary mismanagement. The court concluded that Respondent "colorably contends that he has yet to receive that amount." Pet. App. 9a. As such, it held that Respondent's claim is a claim for "benefits" and may properly be brought by a former plan participant.

The Third Circuit was able to reach this conclusion only by departing from this Court's holding in *Firestone*. Although the appeals court cited *Firestone* in its decision, it questioned the utility and applicability of the distinction that this Court drew between claims for vested benefits and claims for damages, stating that the dichotomy was "unsatisfying" and "appears nowhere in the statute." Pet. App. 13a. The appeals court justified its holding by characterizing the relief that Respondent is seeking as "benefits" rather than "damages," but in so doing, it utterly collapsed the benefits/damages distinction: under the logic of the appeals court, all claims for alleged breaches of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) that arise out of purported mismanagement of plan assets would be for vested benefits rather than damages.

ERISA benefits are calculated based on the terms set forth in the relevant plan. "Vested benefits are benefits that a plan participant has an absolute right to receive." John F. Buckley, ERISA Law Answer Book § 11-1 (5th ed. 2006). "'[V]ested benefits [under ERISA] . . . refer to those normal retirement benefits to which an employee has a nonforfeitable claim.' In short, an employee's vested benefts are the accrued benefits that the employee is actually 'entitled to keep.'" *McClan v. Retail Food Employers Joint Pension Plan*, 413 F.3d 582, 584 (7th Cir. 2005).[1] Claims for vested benefits are generally brought under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B): these claims are equitable in nature;[2] and the relief available is limited to obtaining recovery of the unpaid benefits to which the participant was entitled to receive under the terms of the plan

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1 The wrongful denial of long-term disability benefits would, for example, be a claim for vested benefits. *Dwyer v. Metro. Life Ins. Co.*, No. 00 1514, 4 F. App'x 133, 142 (4th Cir. Feb. 5, 2001); *see also Harrow v. Prudential Ins. Co. of Am.*, 279 F.3d 244, 245 (3d Cir. 2002) (claim for wrongful denial of drug coverage was claim for benefits under ERISA § 502(a)(1)(B)); *Morley v. Avaya Inc. Long Term Disability Plan for Salaried Employees*, No. 04-409 (MLC), 2006 WL 2226336, at *1 (D.N.J. Aug. 3, 2006) (same for wrongful denial of disability benefits); *Leonard v. Educators Mut. Life Ins. Co.*, No. Civ. A. 04-5310, 2005 WL 1041188, at *1 (E.D. Pa. May 5, 2005) (same for wrongfully withheld medical benefits).

2 *Pane v. RCA Corp.*, 868 F.2d 631, 636 (3d Cir. 1989) (holding that claims for benefits under § 502(a)(1)(B) are equitable in nature and that participants are not entitled to a jury trial on these claims); *Turner v. CF&I Steel Corp.*, 770 F.2d 43, 48 (3d Cir. 1985) (holding that jury trials are not available in suits seeking vested benefits because "only equitable relief is available under § 502(a)(1)(B) of ERISA"); *accord Ziman v. Prudential Ins. Co. of Am.*, 909 F. Supp. 279, 281 (E.D. Pa. 1995).

documents, rather than damages for alleged tortious conduct.

The claims that Respondent has brought are quintessentially claims for damages, not vested benefits, and under *Firestone*, Respondent lacks standing to assert such claims.[3]

Respondent does not argue that his benefits were miscalculated or that he has not received a benefit due to him under the terms of the Plan. Respondent is seeking money to compensate Plan participants for alleged tortious harm arising out of breaches of a legal duty – a classic claim for damages.[4] The alleged damages that Respondent seeks are not calculable by reference to the terms of the Plan at all (which are entirely irrelevant to his theory); instead, a damages

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[3] Significantly, the two circuit court cases that this Court quoted in announcing the *Firestone* test, *Kuntz v. Reese*, 785 F.2d 1410 (9th Cir. 1986), and *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d 473 (2d Cir. 1985), both held that former plan participants have standing to bring ERISA claims only when the claims seek "vested benefits," rather than "damages."

[4] *Cf. Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) ("[A]lmost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty.") (quoting *Bowen v. Mass.*, 487 U.S. 879, 918-19 (1988) (Scalia, J., dissenting)); *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) ("Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory *damages* – monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties.").

calculation would require a determination, presumably based on conflicting economic evidence, including the testimony of warring experts, of how much his account would have been worth if, instead of continuing to invest in Conexant common stock, the Plan had deployed its assets in any of a number of alternative investment strategies.

Not only is the relief sought by Respondent not a benefit, but it also is not a *vested* benefit. Claims for vested benefits seek an accrued amount to which a party has an irrevocable right to receive. *See* Buckley, *supra*, § 11-1. The relief sought by Respondent cannot be considered vested, since it is not an amount that he has an absolute right to receive. Respondent's claims in this case are highly contingent: his ability to prove liability is uncertain and the recovery he seeks is entirely speculative. That is why the complaint does not and cannot specify the dollar amount being sought – the amount is simply unknown and unknowable to Respondent and his counsel.

The Third Circuit's opinion directly conflicts with *Firestone's* holding that a former participant with no expectation of returning to covered employment has standing under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) only to bring a suit for vested benefits. As such, it warrants further review by this Court.

II. THE THIRD CIRCUIT'S DECISION DEEPENS EXISTING CIRCUIT SPLITS REGARDING FORMER PARTICIPANT STANDING

The Third Circuit's decision also deepens existing circuit splits on questions of former participant standing. Indeed, the circuits are deeply divided on two

distinct questions concerning the standing of former participants to assert claims for alleged breaches of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).

First, the circuits have split on whether former participants without any expectation of returning to covered employment *ever* have standing to bring claims for alleged breaches of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Some circuits have held that former participants lack standing to bring such claims because such claims necessarily seek damages rather than vested benefits, while other circuits have held that in at least in some instances, former participants do have standing to assert such claims.

Second, the circuits have split on whether the damages/benefits distinction is even relevant for analyzing questions of former participant standing, with one circuit accepting and applying this distinction, and others questioning its usefulness and applicability.

In general, the lower courts (including the district courts) are deeply divided on how to apply this Court's decision in *Firestone* and the relevant ERISA statutory provisions, leading to widespread confusion on how to resolve the question of whether former participants have standing to bring suit for alleged breaches of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).

A. The Circuits Have Split On Whether Former Participants Have Standing To Assert Fiduciary Duty Claims Under ERISA § 502(a)(2)

As discussed above, the circuits are divided on whether former plan participants without any expectation of returning to covered employment *ever* have standing to assert fiduciary duty claims under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).

The Ninth and Tenth Circuits have held that former participants do not have standing to bring fiduciary duty claims under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986) (per curiam), *abrogated on other grounds*, *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449 (9th Cir. 1995); *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir. 1990); *accord Raymond v. Mobil Oil Corp.*, 983 F.2d 1528 (10th Cir. 1993). However, the Third, Sixth, and Seventh Circuits have reached the opposite conclusion. Pet. App. 13a-16a; *Bridges v. Am. Elec. Power Co., Inc.*, 498 F.3d 442, 445 (6th Cir. 2007); *Harzewski v. Guidant Corp.*, 489 F.3d 799, 804 (7th Cir. 2007).

In *Kuntz v. Reese*, 785 F.2d 1410 (9th Cir. 1986), former employees who had received a lump sum distribution of their benefits when they retired sought to bring fiduciary duty claims under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). *Kuntz*, 785 F.2d at 1411. The former employees alleged that the plan fiduciaries had lied about the amount of benefits that plaintiffs were entitled to receive under the terms of the plan and that the fiduciaries had failed to comply with ERISA's requirements for disclosing plan documents. *Kuntz v. Reese*, 760 F.2d 926, 929 (9th Cir. 1985). The Ninth

Circuit held that, because the plaintiffs did not allege that their vested benefits were improperly computed, but instead alleged a breach of fiduciary duty, any recoverable damages would not be vested benefits due under the terms of the plan and as such former employees did not have standing to sue. *Kuntz*, 785 F.2d at 1411.

As the Ninth Circuit wrote:

> [b]ecause, if successful, the plaintiffs' claim would result in a damage award, not in an increase in vested benefits, they are not plan participants. The *Kuntz* plaintiffs do not allege that their vested benefits were improperly computed, rather they allege breach of fiduciary duty or of a duty to disclose information about benefits thus any recoverable damages would not be benefits from the plan.

Id.[5]

Similarly, in *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir. 1990), a former employee who had taken

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[5] In *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406 (9th Cir. 1988), a different panel of the Ninth Circuit distinguished *Kuntz* in holding that former participants have standing to bring claims for alleged breaches of the fiduciary duty of loyalty due to theft plan assets. *Id.* at 1419. The court noted that its decision was limited to facts of the case, holding that "for the limited purpose of granting plan participants and beneficiaries standing to sue in cases such as this one, ill-gotten profits held in a constructive trust for plan participants and beneficiaries may be construed as equitably vested benefits under an ERISA plan." *Id.* at 1419.

early retirement sued his former employer alleging that, among other things, plan administrators breached their fiduciary duties by amending the plan to reduce future benefits available to participants. In order to avoid the prospective changes to the plan, the plaintiff accepted early retirement and took a lump sum distribution of the benefits that had accrued to him at that time he retired. *Id.* at 466. Subsequently, after he had retired and cashed out of the plan, he attempted to assert a number of ERISA-based claims, including claims for breach of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), alleging that plan fiduciaries had breached their duties in amending the plan. *Id.* at 473. The Tenth Circuit concluded that the plaintiff, as a former plan participant who had received all the benefits due to him under the terms of the plan, no longer had standing to assert claims under ERISA. *Id.* at 474.

The logic of the courts in *Kuntz* and *Mitchell* is that claims for alleged breaches of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), *necessarily* seek damages, as opposed to vested benefits, so that former plan participants may *never* bring such claims.

In sharp contrast, each of the Third, Seventh and Sixth Circuits have in the last few months all reached the conclusion that former plan participants who have cashed out of the relevant ERISA plan before filing suit may nevertheless pursue damages claims against plan fiduciaries on the theory that the fiduciaries breached their duties to plan participants by allowing company stock to remain as an investment option even after it became imprudent to do so. Pet. App. 22a; *Bridges v. Am. Elec. Power Co., Inc.*, 498 F.3d 442, 445 (6th Cir. 2007); *Harzewski v. Guidant Corp.*, 489 F.3d 799, 804

(7th Cir. 2007).[6] The reasoning of each court is the same, and is wholly inconsistent with the reasoning and outcome in *Kuntz* and *Mitchell*.

Further review of this question is warranted to resolve this split among the circuits.

B. The Circuits Have Split On The Proper Framework To Use In Analyzing Questions of Former Participant Standing Under ERISA

The circuits have also split on the proper framework for analyzing questions of former participant standing. The Fifth Circuit has accepted the distinction that this

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[6] *See also Coan v. Kaufman*, 457 F.3d 250, 255-56 (2d Cir. 2006) (suggesting in *dicta* that, in the context of a defined contribution plan, claims seeking damages as a result of alleged fiduciary mismanagement of plan assets may qualify as claims for benefits, rather than damages, and that under *Firestone*, a former plan participant may have standing to assert such a claim).

Additionally, many district courts considering this question have held that former plan participants have standing to bring fiduciary duty claims. *In re Boston Sci. Corp. ERISA Litig.*, 506 F. Supp. 2d 73, 74-75 (D. Mass. 2007); *Brieger v. Tellabs, Inc.*, 473 F. Supp. 2d 878, 886-87 (N.D. Ill. 2007); *Smith v. Aon Corp.*, 238 F.R.D. 609, 615-16 (N.D. Ill. 2006); *In re Aquila ERISA Litig.*, 237 F.R.D. 202, 206 (W.D. Mo. 2006); *In re Williams Cos. ERISA Litig.*, 231 F.R.D. 416, 422 (N.D. Okla. 2005); *Rankin v. Rots*, 220 F.R.D. 511, 519-20 (E.D. Mich. 2004); *Kuper v. Quantum Chem. Corp.*, 829 F. Supp. 918, 921-23 (S.D. Ohio 1993); *Thompson v. Avondale Indus., Inc.*, No. Civ. A. 99-3439, 2001 WL 1543497, at *2 (E.D. La. Nov. 30, 2001); *Gray v. Briggs*, No. 97 Civ. 6252 (DLC), 1998 WL 386177, at *4-5 (S.D.N.Y. July 7, 1998).

Court drew in *Firestone* between damages and vested benefits and applied that distinction in analyzing questions concerning former participant standing in the context of a claim of plan mismanagement, *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 350 (5th Cir. 1989), while the Third, Sixth, and Seventh Circuits, in the same cases discussed above, have questioned the relevance of the distinction in this context and have effectively ignored the distinction by holding that *any* claims for alleged breaches of fiduciary duty under ERISA § 502(a)(2) arising out of purported mismanagement of plan assets seek damages under *Firestone*.

In *Sommers*, the Fifth Circuit considered whether former plan participants had standing to assert fiduciary duty claims under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), based on allegations about an imprudent investment choice by plan fiduciaries. The plaintiffs in *Sommers* were a class of former participants and beneficiaries in a defined contribution plan, which had been terminated by the fiduciaries after the sponsor was acquired by another company. *Sommers*, 883 F.2d at 347. The plan fiduciaries accepted an offer by the acquiring company to purchase all outstanding stock held by the plan. The fiduciaries then liquidated the plan's holdings, distributed the proceeds, and terminated the plan. *Id.* The former participants of the plan brought claims under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), alleging that the fiduciaries had breached their duties, mismanaging plan assets by agreeing to sell the company stock for a less than its fair market value. After a trial in which the jury ruled in favor of the defendants, plaintiffs appealed. In connection with that appeal, defendants

asked the Fifth Circuit to hold that plaintiffs had lacked standing to pursue their claims.

In analyzing the question of former participant standing, the Fifth Circuit followed this Court's holding in *Firestone* and applied the damages/benefits analysis required by *Firestone*. *Id.* at 349-50. The Fifth Circuit noted that, on the facts of that case, the question of whether former participants had standing to assert their claim was a close one, but because the claim was "quite close to a simple claim that benefits were miscalculated," *id.* at 350, the Fifth Circuit held that former participants had standing to assert such a claim. *Id.* Significantly, the recovery sought in that case was for a specific and ascertainable amount, namely, the difference between the amount the plan received for its holdings in the sponsor's stock and the market value of the stock on the day it was sold.[7]

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[7] Numerous district courts considering the question of former participant standing to assert claims for alleged breaches of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), have also relied on the distinction between damages and vested benefits in holding that former participants lack standing to bring such claims. *See In re Patterson Cos. Inc. Sec., Derivative & ERISA Litig.*, 479 F. Supp. 2d 1014, 1042-43 (D. Minn. 2007); *Lively v. Dynegy, Inc.*, No. 05-CV-00063-MJR, 2007 WL 685861, at *5 (S.D. Ill. Mar. 2, 2007); *Caltagirone & Greenblatt v. N.Y. Cmty. Bancorp*, 457 F. Supp. 2d 145, 149 (E.D.N.Y. 2006); *Evans v. Akers*, 466 F. Supp. 2d 371, 375-77 (D. Mass. 2006); *Dickerson v. Feldman*, 426 F. Supp. 2d 130, 136-37 (S.D.N.Y. 2006); *In re Mut. Funds Inv. Litig.*, Civ. No. JFM-05-2711, 2006 WL 2381056, at *1 (D. Md. Aug. 15, 2006); *In re RCN Litig.*, No. 04-5068, 2006 WL 753149, at *14 (D.N.J. Mar. 21, 2006); *LaLonde v. Textron, Inc.*, 418 F. Supp. 2d 16, 20 (D.R.I. 2006); *Holtzscher v. Dynegy, Inc.*, No. Civ. A. H-05-3293, 2006 WL 626402, at *4-5 (S.D. Tex. Mar. 13, 2006);

By contrast, the Third, Sixth, and Seventh Circuits have all questioned the relevance of the damages/benefits distinction.

In this case, for example, the Third Circuit stated that "we cannot endorse the distinction . . . between benefits and damages." Pet. App. 14a. Although the appeals court ultimately characterized the recovery sought as a "benefit," it effectively collapsed any distinction between damages and vested benefits, saying that "[b]enefits are benefits; in a defined-contribution plan, they are the value of the retirement account when the employee retires, and a breach of fiduciary duty that diminishes that value gives rise to a claim for benefits measured by the difference between what the retirement account was worth when the employee retired and cashed it out and what it would have been worth then had it not been for the breach of fiduciary duty." Pet. App. 10a.

The Seventh Circuit and the Sixth Circuit similarly collapsed the benefits/damages distinction. *Harzewski v. Guidant Corp.*, 489 F.3d 799, 804 (7th Cir. 2007); *Bridges v. Am. Elec. Power Co., Inc.*, 498 F.3d 442, 445 (6th Cir. 2007). Like the Third Circuit, the Sixth and Seventh Circuits determined that a benefit in a defined

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In re Guidant Corp. ERISA Litig., No. 1:05-CV-1009-LM-TAB, 2006 WL 2828882, at *3-5 (S.D. Ind. Sept. 15, 2006); *Howell v. Motorola, Inc.*, No. 03-C-5044, 2006 WL 2355586, at *5-7 (N.D. Ill. Aug. 11, 2006); *In re AEP ERISA Litig.*, 437 F. Supp. 2d 750, 760-62 (S.D. Ohio 2006); *In re Admin. Comm. ERISA Litig.*, No. C03-3302 (PJH), 2005 WL 3454126, at *4–5 (N.D. Cal. Dec. 16, 2005); *Hargrave v. TXU Corp.*, 392 F. Supp. 2d 785, 788 (N.D. Tex. 2005); *Vaughn v. Bay Envtl. Mgmt., Inc.*, No. C 03-5725 MJJ, 2005 WL 2373718, at *3-4 (N.D. Cal. Sept. 26, 2005).

contribution plan is the amount in a participant's account when the employee retires or whatever would have been there had the plan honored the employee's entitlement, which includes an entitlement to prudent management; accordingly, these courts reasoned that suits for alleged breaches of fiduciary duty arising out of purported mismanagement of plan assets seek benefits. *Harzewski*, 489 F.3d at 804-05; *Bridges*, 498 F.3d at 445.

Under the logic of the Third Circuit in *Graden*, as well as of the Seventh Circuit in *Harzewski* and the Sixth in *Bridges*, claims for alleged breaches of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), arising out of purported imprudent management of the assets of a defined contribution plan will always be claims for "vested benefits," and thus former participants will always have standing to assert such claims.

* * *

This same issue decided by these courts – that of former participant standing to bring suit for alleged breaches of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) for purportedly imprudent management of plan assets – is now on appeal in three additional circuits,[8] and so additional conflicting precedents are likely.

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[8] *Evans v. Akers et al.*, No. 07-01140 (1st Cir. filed Jan. 22, 2007); *In re Mutual Funds Inv. Litig.*, No. 06-2175 (4th Cir. filed Nov. 8, 2006); *Dickerson v. Feldman*, No. 06-1616-cv (2d Cir. filed Apr. 5, 2006).

Moreover, the general confusion among the lower courts – the disagreement over the meaning of this Court's decision in *Firestone* and over the appropriate interpretation of the applicable ERISA provisions – has resulted in repeated litigation on the same exact legal issue and in the circuit splits discussed above. In this situation, the issue of former participant standing merits further review by this Court.

III. THE QUESTION OF FORMER PARTICIPANT STANDING IS ONE OF EXCEPTIONAL IMPORTANCE

This petition addresses a question of exceptional importance. In holding that Respondent had standing to assert his claim for alleged breaches of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), the Third Circuit adopted a "once a participant, always a participant" approach to ERISA standing that would have far-reaching implications for plan sponsors and administrators. The appeals court's decision effectively means that ERISA fiduciary liability is never extinguished. This type of "evergreen" ERISA claim places plan sponsors and administrators at risk of potentially enormous liability to former plan participants, who may have long since cashed out their plan accounts.

The National Association of Manufacturers ("NAM"), the nation's largest industrial trade association, representing manufacturers in every industrial sector, voiced these concerns of plan sponsors and administrators in the *amicus* brief it submitted in the Third Circuit in support of Petitioners' position. Pet. App. 45a-60a. NAM argued that granting former plan participants standing to bring claims for damages

for alleged breaches of fiduciary duties arising out of claimed mismanagement of plan assets would impose additional costs and burdens on plan administrators, including but not limited to significant additional reporting and recordkeeping costs. Pet. App. 55a-56a. Indeed, the additional burdens placed on plan fiduciaries by the Third Circuit's decision, if it is permitted to stand, could lead employers to forgo sponsoring pension plans altogether, if they have not yet adopted such plans, or to terminate the plans that already exist.

The importance of the question of former participant standing to bring damages claims under ERISA is further demonstrated by the sheer number of recent cases addressing the issue in inconsistent ways. *See supra*, pp. 20-21 & nn.6 & 7.

The question of the standing former participants to bring claims for alleged breaches of ERISA fiduciary duties is clearly of great importance to numerous litigants, as well as to the many companies that sponsor ERISA retirement plans.

CONCLUSION

We respectfully submit that this Court should grant a writ of certiorari to the Third Circuit in order to resolve the disagreement among the circuit courts on the question of former participant standing to assert claims for breaches of fiduciary duty under ERISA.

Respectfully submitted,

RICHARD A. ROSEN
Counsel of Record
ROBYN F. TARNOFSKY
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

- and -

GREGORY B. REILLY
LOWENSTEIN SANDLER PC
65 Livingston Avenue
Roseland, New Jersey 07068
(973) 452-3100

Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT.

HOWARD GRADEN, individually and on behalf of all others similarly situated,
Appellant

v.

CONEXANT SYSTEMS INC.; DWIGHT W. DECKER; ARMANDO GEDAY; ROBERT MCMULLAN; MICHAEL VISHNY; PLAN COMMITTEE MEMBERS; JOHN DOES 1-10 fictitious names; J. SCOTT BLOUIN; BALAKRISHNAN S. IYER; DENNIS E. O'REILLY; KERRY K. PETRY; BRADLEY W. YATES.

No. 06-2337.

Argued April 19, 2007.
Opinion filed July 31, 2007.

Robert Harwood, Esquire, Jeffrey M. Norton, Esquire (Argued), Wechsler Harwood, New York, NY, Lisa J. Rodriguez, Esquire, Trujillo Rodriguez & Richards LC, Haddonfield, NJ, for Appellant.

Richard A. Rosen, Esquire, Robyn F. Tarnofsky, Esquire (Argued), Kerry L. Quinn, Esquire, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY, Gregory B. Reilly, Esquire, Deborah A. Silodor, Esquire, Lowenstein Sandler, Roseland, NJ, for Appellees.

Jay E. Shushelsky, Esquire, Melvin R. Radowitz, Esquire, American Association of Retired Persons, Washington, DC, Howard M. Radzely, Solicitor of

Labor, Timothy D. Hauser, Associate Solicitor, Karen Handorf, Esquire, Appellate and Special Litigation, Elizabeth Goldberg, Esquire (Argued), United States Department of Labor, Washington, DC, for Amicus-Appellant.

Jan S. Amundson, Esquire, National Association of Manufacturers, Washington, DC, for Amicus-Appellee.

Before: McKEE, AMBRO and MICHEL*, Circuit Judges.

OPINION OF THE COURT

AMBRO, Circuit Judge.

We decide whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, gives an ostensibly cashed-out former employee the right to sue the administrator of his former employer's 401(k) plan for allegedly mismanaging plan assets and thus reducing his share of benefits. Because ERISA includes such a plaintiff in its definition of "participant," he has statutory standing to assert his claim.

I. Facts and Procedural History

Howard Graden was a Conexant employee until September 2002 and a participant in the Conexant Retirement Saving Plan until October 2004. Like most 401(k) plans, Conexant's is a "defined contribution" one in which participants and the employer contribute

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* Honorable Paul R. Michel, Chief Judge, United States Court of Appeals for the Federal Circuit, sitting by designation.

money into the participants' individual accounts. Participants elect to invest their money in various predetermined investment packages. Here, Graden directed his money into Conexant Stock Fund B, a package composed entirely of Conexant common stock.

Conexant develops semiconductor devices for broadband communications equipment, and its common stock trades on the NASDAQ. Graden's claim centers on the period between March and October 2004. On March 5, 2004, Conexant's common stock closed at a 52-week high of $7.42 per share. By October 4, 2004 (when Graden voluntarily cashed out), it had plummeted to $1.70 per share. According to Graden, the March-to-October drop was the result of a risky and ultimately failed merger. Conexant,[1] he alleges, breached its fiduciary duties to him and other plan participants by (1) offering the stock fund as an investment option despite the fact that it was not (and was known not to be) a prudent investment, and (2) making false and misleading statements about the merger that caused him to invest in the fund.

The District Court dismissed Graden's action for lack of statutory standing, ruling that he was not a "participant" for purposes of ERISA because he had already cashed out of the plan. Because statutory standing is an issue of subject matter jurisdiction, the Court stopped after concluding that it had none and did not consider Conexant's alternative argument that

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[1] The defendants include Conexant, its officers, and the individual members of the committee that administered the Conexant Plan. For ease of use, we refer to them collectively as "Conexant."

Graden failed to state a claim on which relief could be granted.

Graden appeals to us.[2] With him are two *amici curiae*: the Secretary of Labor and AARP.[3] Filing an *amicus* brief on Conexant's side is the National Association of Manufacturers.

II. Statutory Standing

As noted, the question presented is one of statutory standing. There is no dispute about Article III or prudential standing. Though all are termed "standing," the differences between statutory, constitutional, and prudential standing are important. Constitutional and prudential standing are about, respectively, the constitutional power of a federal court to resolve a dispute and the wisdom of so doing. *See Presbytery of N.J. of the Orthodox Presbyterian Church v. Florio,* 40 F.3d 1454, 1462 (3d Cir.1994); *Amato v. Wilentz,* 952 F.2d 742, 748 (3d Cir.1991). Statutory standing is simply statutory interpretation: the question it asks is whether Congress has accorded *this* injured plaintiff the right to sue the defendant to redress his injury. To answer the question, we employ the usual tools of statutory interpretation. We look first at the text of the

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2 We have appellate jurisdiction under 28 U.S.C. § 1291. We review dismissals for lack of standing *de novo*, taking the facts alleged in the complaint as true. *Pa. Mines Corp. v. Holland,* 197 F.3d 114, 119 n. 2 (3d Cir.1999).

3 Formerly known as the American Association of Retired Persons. AARP adopted its popular four-letter acronym as its official name in 1999. It thereby took the reference to retirement out of its name in recognition of the fact that nearly half of its members are still working.

statute and then, if ambiguous, to other indicia of congressional intent such as the legislative history. *See In re Mehta*, 310 F.3d 308, 311 (3d Cir.2002).

Graden alleges that Conexant's mismanagement of plan assets caused a loss to the plan that ultimately harmed him and other plan participants. At the pleadings stage (where we accept Graden's allegations as true), this allegation clearly qualifies as a concrete injury traceable to Conexant and redressable by a court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Moreover, we see no prudential concerns that would prevent us from exercising jurisdiction.

It is undisputed that the Conexant plan is an employee benefit plan governed by ERISA. In addition, we assume for purposes of this appeal that the defendants are fiduciaries of the Conexant plan. Graden brought this action under 29 U.S.C. § 1132(a)(2), which accords various parties the right to sue ERISA plan fiduciaries for breaches of their fiduciary duties. Section 1109(a) provides the following remedies for such breaches:

> [(1)] mak[ing] good to such plan any losses to the plan resulting from each such breach, ... [(2)] ... restor[ing] to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and [(3)] ... such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

As § 1132(a)(2) addresses losses to ERISA plans resulting from fiduciary misconduct, the Supreme Court has held that suits under it are derivative in

nature-that is, while various parties are entitled to bring suit (participants, beneficiaries,[4] fiduciaries, and the Secretary of Labor), they do so on behalf of the plan itself. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985); *see also In re Schering-Plough Corp. ERISA Litigation*, 420 F.3d 231, 241 (3d Cir.2005). Consequently, the plan takes legal title to any recovery, which then inures to the benefit of its participants and beneficiaries.

The analogy that comes to mind quickest is to shareholder derivative litigation, but the trust-law roots of § 1132(a)(2) run far deeper.[5] When a common-law trustee commits a breach of trust that results in a loss, any beneficiary whose beneficial interests were affected may sue to compel the trustee to make good on the loss. RESTATEMENT (SECOND) OF TRUSTS § 214 & cmt. b (1959). When the trustee does so, he restores money to the trust for the benefit of the

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[4] In ERISA, "participant" and "beneficiary" are distinct terms of art. The former refers to an employee or former employee who takes part in his employer's plan. 29 U.S.C. § 1002(7). The latter is a person designated by a participant to recover benefits in the event of the participant's death. 29 U.S.C. § 1002(8). The terms can be confusing because, while ERISA is widely analogous to the common law of trusts, the terminology differs. At common law, everyone entitled to a beneficial interest in the principal or income of a trust is termed a "beneficiary." BLACK'S LAW DICTIONARY 165 (8th ed. 2004).

[5] This is not surprising. As the Supreme Court noted in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), "ERISA abounds with the language and terminology of trust law." Thus, we believe that the close analogy to suits on behalf of a common law trust is hardly accidental.

plaintiff/beneficiary. *See* AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 214 (4th ed. 1988); P.V. BAKER & P. ST. J. LANGAN, SNELL'S EQUITY 284 (29th ed. 1990) (citing *Bartlett & Others v. Barclay's Bank Tr. Co. Ltd.*, [1980] Ch. 514, 543); *cf.* UNIF. TR. CODE § 1002(a)(1) (measuring trustee liability by "the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred"). Thus, § 1132(a)(2) merely codifies for ERISA participants and beneficiaries a classic trust-law process for recovering trust losses through a suit on behalf of the trust.[6]

Graden claims that he may bring suit as a current "participant" in the Conexant plan.[7] ERISA defines a

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[6] Conexant urges that we analogize § 1132(a)(2) actions to shareholder derivative suits, where the contemporaneous ownership rule would prevent someone like Graden from having standing. The analogy is inapt. Corporate shareholders own an equity interest in the corporation; they do not own a right to any particular asset or stream of payments. Any benefit they receive from successfully prosecuting the corporation's suit is necessarily indirect, as any damages go into the coffers of the corporation. Those damages do not necessarily (or even typically) come back out to the shareholders as a direct payment. In the ERISA context, however, participants have a right to receive certain monetary benefits. Unlike in the corporate context, the loss to participants is direct, as any recovery made "on behalf of the plan" must be paid out to the injured participant in the form of augmented benefit payments.

[7] There is an open question in our Court as to when statutory standing must attach. *Leuthner v. Blue Cross & Blue Shield of Ne. Pa.*, 454 F.3d 120, 127 (3d Cir. 2006) (declining to decide the issue with regard to a § 1132(a)(3) claim for equitable relief). In *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 78

participant as "any employee or former employee ... who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7). Applying this definition, the Supreme Court has held that the term covers a former employee with a colorable claim for "vested benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 118, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) (quoting *Saladino v. I.L. G.W.U. Nat'l Ret. Fund*, 754 F.2d 473, 476 (2d Cir.1985)). Graden's argument is that because Conexant's breaches improperly reduced the value of plan assets allocable to him, he is entitled to additional benefits that will become available once Conexant makes good the loss to the plan.

To evaluate Graden's argument, we begin with the definition of "benefit." The term is not expressly defined in ERISA, so we look to its ordinary meaning. A relevant definition is a "payment or service provided for under an annuity, pension plan, or insurance policy." MERRIAM-WEBSTER'S ONLINE DICTIONARY, http:// www. m- w. com/ dictionary/

(3d Cir.2001). we held that, in the context of a § 1132(a)(1)(A) suit (for failure to provide information), a person need only be a participant at the time of breach to have statutory standing. We expressly did not require that a person be a participant at the time of suit. *Id.* Because the relevant language of § 1132(a)(1)(A) and (a)(2) are the same, one would expect the *Daniels* holding to apply here. Graden, however, did not make the argument in his brief; rather, his sole contention is that he is a participant now. Absent compelling circumstances not present here. failing to raise an argument in one's opening brief waives it. *Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir.1994). We therefore leave for another day the question of whether the *Daniels* holding applies to § 1132(a)(2) actions.

benefit. Essentially, "benefits" are simply the money to which a person is entitled under an ERISA plan. In this context, is what Graden seeks a benefit?

The Conexant plan is an "individual account plan."[8] *See* 29 U.S.C. § 1002(34). This means that a participant's vested benefits are the contents of his account: contributions (from both the participant and employer) plus investment gains minus investment losses and any allocable expenses. 29 U.S.C. § 1002(34). In addition, ERISA imposes fiduciary duties on plan administrators, 29 U.S.C. § 1104, so part of a participant's entitlement is the value of his account unencumbered by any fiduciary impropriety. In other words, ERISA entitles individual-account-plan participants not only to what *is* in their accounts, but also to what *should be* there given the terms of the plan and ERISA's fiduciary obligations.

From this, it is not difficult to conclude that Graden has standing as a plan participant. As an account-holder in the Conexant plan, he was entitled to the net value of his account as it should have been in the absence of any fiduciary mismanagement. Because he colorably contends that he has yet to receive that amount, he presses a claim for the remainder of his monetary entitlement under his plan and ERISA-a claim for benefits. That he presses it through § 1132(a)(2) is of no moment (and, indeed, is sensible here). Rather than suing the plan itself under §

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[8] The term "defined contribution plan" is interchangeable. 29 U.S.C. § 1002(34).

1132(a)(1)(B),[9] which would likely be fruitless, as the very premise of the suit is that the plan itself improperly lost money, he sued the person liable to make good on the loss. If successful, this suit will restore assets to the plan that are allocable to Graden's account, and he will then get a distribution from that restored account. Far from creating problems, this is exactly the process that § 1132(a)(2)-borrowing from trust law-contemplates.

Our holding accords with the reasoning of our sister courts of appeals on this issue. In *Harzewski v. Guidant Corp.*, 489 F.3d 799 (7th Cir.2007) (Posner, J.), the Court of Appeals for the Seventh Circuit decided this very issue the same way. Explaining whether stock losses like Graden's are "benefits," it stated:

> Benefits are benefits; in a defined-contribution plan they are the value of the retirement account when the employee retires, and a breach of fiduciary duty that diminishes that value gives rise to a claim for benefits measured by the difference between what the retirement account was worth when the employee retired and cashed it out and what it would have been worth then had it not been for the breach of fiduciary duty.

Id. at 807.

In *Coan v. Kaufman*, 457 F.3d 250, 255-56 (2d Cir.2006), the Second Circuit Court of Appeals noted that various courts have held that former employees

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[9] Section 1132(a)(1)(B) allows participants to sue ERISA plans for benefits due them.

who accept lump-sum distributions surrender their participant status and the right to sue for breaches of fiduciary duty. The Court recognized, however, that these holdings, while sensible in the context of defined benefit plans,[10] are more of a problem in defined contribution plans:

> [W]hether acceptance of a lump-sum payment terminates a person's status as a participant may depend on whether the plan is a "defined benefits" or a "defined contribution" plan. Coan, unlike the plaintiffs discussed in other circuits' case law, participated in a 401(k) plan, which is an "individual account" or "defined contribution" plan under ERISA. *See* 29 U.S.C. § 1002(34). According to ERISA, an individual's "accrued benefit[s]" under such a plan are simply "the balance of the individual's account." *Id.* § 1002(23)(B). Arguably, therefore, Coan's claim that the lump-sum distribution of her account balance would have been greater absent the defendants' breach of fiduciary duty is a claim "for benefits" which, if "colorable," means that she "may become eligible for benefits" and thus qualifies as a "participant" under ERISA.

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[10] In a defined benefit plan, the amount of a participant's benefits are typically determined by a formula in the plan instrument. *See Chait v. Bernstein*, 835 F.2d 1017, 1019 n. 1 (3d Cir. 1987). Thus, once a participant takes a lump sum distribution of the correct amount, he has all of his vested benefits and may no longer sue for any alleged fiduciary breaches. *See Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986) (*per curiam*). If, however, the lump sum were improperly calculated or otherwise deficient, then the participant would retain a claim for benefits and thus have standing to sue. *See Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 349-50 (5th Cir. 1989).

Id. at 255-56. The Court ultimately did not decide the question, but its analysis is compelling.

Similarly, in *Crawford v. Lamantia*, 34 F.3d 28, 33 (1st Cir. 1994), the First Circuit Court of Appeals adopted the general rule that former employees with claims for additional benefits have standing, but ruled that the particular plaintiff in that case lacked standing because he "failed to show that defendants' alleged breach of fiduciary duty had a direct and inevitable effect on *his* benefits." In our case, on the other hand, it is clear that the alleged breach had an effect on Graden's benefits because their value dropped with the value of Conexant's common stock.

III. Additional Arguments

While we believe that our reasoning in Part II is sufficient to resolve this case, we continue to respond more fully to Conexant's and its *amicus*'s arguments. Specifically, Conexant contends that Graden's claim is better characterized as one for damages rather than benefits. Along those same lines, it argues that because Graden cannot assert a § 1132(a)(1)(B) claim, he cannot make a claim for benefits. In addition, Graden's alleged loss is, it claims, too speculative or difficult to ascertain to be characterized as benefits. Finally, it argues that public policy considerations counsel in favor of its interpretation. We respond to each argument in turn.

The Fifth and Ninth Circuit Courts of Appeals decided the first important cases in this area, and they both drew a line between claims for "benefits" and claims for "damages." *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 349-50 (5th Cir.1989); *Kuntz v. Reese*, 785 F.2d

1410, 1411 (9th Cir.1986) (*per curiam*). Having a colorable claim for vested benefits gives a person participant standing, even if his employer has ostensibly cashed him out of the plan. *Sommers*, 883 F.2d at 350. In those cases, the dispute is over whether the employee was properly accorded all of the benefits due him; hence, for standing purposes all the employee needs is a colorable claim that he is entitled to additional benefits under the plan. The *Sommers* Court, relying on its decision in *Yancy v. Am. Petrofina, Inc.*, 768 F.2d 707 (5th Cir.1985), contrasted having a claim for benefits with a claim for damages. *Sommers*, 883 F.2d at 349-50.

However, relying on a benefits/damages dichotomy is unsatisfying:

> The distinction between "benefits" and "damages" is not clear. This is in part attributable to use of words with overlapping meaning to describe mutually exclusive categories. The statute simply grants rights of recovery only to a distinct and limited type of claim which itself is no more than a suit for damages, albeit personally suffered because participants should have been paid under the plan but were not. Clearly, a plaintiff alleging that his benefits were wrongly computed has a claim for vested benefits. Payment of the sum sought by such a plaintiff will not increase payments due him. On the other hand, a plaintiff who seeks the recovery for the trust of an unascertainable amount, with no demonstration that the recovery will directly effect payment to him, would state a claim for damages, not benefits.

Id. In *Sommers*, the plaintiffs were former employees cashed out of an ERISA plan when the

trustees sold the assets of the plan (shares of the employer's common stock) for cash in a transaction incident to a merger. The plaintiffs sued under § 1132(a)(2), alleging that the trustees breached their fiduciary duties by agreeing to sell the shares for less than fair market value. Like Graden, they sued to compel the trustees to make good on the loss caused by their breach. The Court concluded that the employees were participants with standing because they "ha[d] a claim for an ascertainable amount allegedly owed them at the time they received their lump sum." *Id.* at 350.

The Ninth Circuit Court has also clarified that former employees are participants with standing when they sue for disgorgement of a plan fiduciary's ill-gotten profits. *Amalgamated Clothing & Textile Workers Union v. Murdock,* 861 F.2d 1406, 1411 (9th Cir.1988). The Court held that such profits are vested benefits because under ERISA (and the common law of trusts) the plan has a legal interest in them. Thus, ERISA allows a district court to order disgorging those profits and placing a constructive trust on them for the ultimate benefit of the plan participants. As the Court noted, disgorgement and the imposition of a constructive trust are both classic equitable remedies, *id.*; hence, they fit easily in ERISA's remedial scheme.

While we believe that *Sommers* was rightly decided, we cannot endorse the distinction it makes between benefits and damages.[11] Per *Sommers,* suits for

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[11] The Court of Appeals for the Seventh Circuit has also noted that though *Sommers* reached the correct result, its benefit/damages distinction is unpersuasive. *Harzewski,* 489 F.3d at 806-07.

miscalculated benefits seek monetary, compensatory relief which is, in common legal parlance, "damages." 883 F.2d at 349. Yet it is beyond dispute that such relief is at the same time properly characterized as "benefits" because it merely gives the participant what he is entitled to receive under the plan. With this confusing overlap, the dichotomy breaks down. Moreover, the dichotomy appears nowhere in the statute, nor is it necessary to explain the outcomes reached by this line of jurisprudence. In *Yancy*, for example, the plaintiff sought to recover benefits that he argued would have vested had he not retired early. 768 F.2d at 708-09. Yancy claimed that he retired early because the plan administrator intended illegally to reduce future benefits. *Id.* at 708. The Court denied Yancy standing, but its reasoning, which implied that he was not seeking "benefits," needs clarification because what Yancy sought were in fact plan payments. The problem with Yancy's claim was that he sought benefits for which he could never become eligible because his voluntary retirement occurred before those benefits came into existence.[12]

In reaching its decision, the *Sommers* Court did emphasize what the plaintiff was entitled on the day of his retirement. That, we believe, is the question that properly governs these cases. If the plaintiff colorably

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[12] A fuller analysis of a similar situation appears in our opinion in *Miller v. Rite Aid Corp.*, 334 F.3d 335 (3d Cir.2003). There we held that if a plaintiff seeks plan payments for which he did not qualify under the terms of the plan, then his claim, though for benefits, is not colorable, and so he lacks standing. *Id.* at 343.

claims that under the plan and ERISA he was entitled to more than he received on the day he cashed out, then he presses a claim for vested benefits and must be accorded participant standing. If, on the other hand, he claims that his benefits were all he was entitled to under the plan the day they were paid but that he should yet recover something more, then he presses a claim for something other than vested benefits and is not entitled to standing.[13]

Perhaps a stronger reason not to rely on the benefits/damages dichotomy is the extent to which it causes confusion with the damages/equitable relief dichotomy that is of great import in § 1132(a)(3) cla ıs. Unlike § 1132(a)(2), which specifically imposes personal, monetary liability on trustees for breaches of fiduciary duties, § 1132(a)(3) provides that courts may "enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or [grant] other appropriate equitable relief." 29 U.S.C. § 1132(a)(3) (internal subparagraph divisions omitted). To determine what qualifies as "equitable" relief, the Supreme Court has drawn a bright-line distinction between traditional equitable relief (*e.g.*, injunction, equitable lien, constructive trust), which is available under § 1132(a)(3), and traditional legal relief (*e.g.*,

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[13] Of use might be a dichotomy between suits for benefits and suits for *extracontractual* damages. This distinction was prominent in the Supreme Court's *Massachusetts Mutual* analysis because it is a sensible way of separating what the plan and ERISA actually entitle the participant and claims for compensatory or punitive relief that, though possibly cognizable under some provision of ERISA or state law, are not actually part of the ERISA entitlement. *See* 473 U.S. at 138, 144, 105 S.Ct. 3085.

money damages), which is not. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256-57, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993); *accord Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 215, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002). The argument to which the Court was responding contended that *any* relief that a court of equity would award in a breach of trust action should qualify as "equitable" for § 1132(a)(3) purposes. *Mertens*, 508 U.S. at 255, 113 S.Ct. 2063. Because courts of equity had exclusive jurisdiction over breach of trust actions, all of the relief available-even relief similar in kind to money damages-was awarded in equity. The Court held that to construe the term "equitable" in that manner would render it superfluous. *Id.* at 257, 113 S.Ct. 2063.

Much of Conexant's briefing tries to convince us that what Graden seeks are damages under the *Mertens/Great-West* formulation. The problem is that whether the relief Graden seeks is properly characterized as legal or equitable, which is the question to which *Mertens* and *Great-West* speak, is not relevant here. Unlike § 1132(a)(3), nothing in § 1132(a)(2) limits the relief available to equitable relief. Similarly, nothing in the definition of "participant" requires Graden to seek "equitable" relief.

Conexant also relies on the supposed unavailability of § 1132(a)(1)(B) relief. That subparagraph allows a participant "to recover benefits due to him under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B). Conexant argues that Graden could not bring such a claim, and that he, therefore, lacks standing. We disagree. One of the key differences between § 1132(a)(1)(B) and (a)(2) is who is a proper defendant. In a § 1132(a)(1)(B) claim, the defendant is the plan itself (or plan administrators

in their official capacities only). *See Chapman v. ChoiceCare Long Island Term Disability Plan*, 288 F.3d 506, 509-10 (2d Cir.2002) (citations omitted). On the other hand, the defendant in a § 1132(a)(2) claim is a plan fiduciary in its individual capacity. *See In re Schering-Plough*, 420 F.3d at 235. Under the Conexant plan, Graden is entitled to the corpus and proceeds of his prudently invested contributions. We believe that he could demand a full benefit payment from the plan itself under § 1132(a)(1)(B). He, however, had good reason for not bringing such an action. In individual account plans, all of the plan's money is allocable to plan participants. 29 U.S.C. § 1002(34). Using a § 1132(a)(1)(B) suit to force the plan to use money already allocated to others' accounts to make good on Graden's loss would present a host of difficulties with which few sensible plaintiffs would want to contend. Indeed, it may be that ERISA's fiduciary obligations prevent plans from paying judgments out of funds allocable to other participants, in which case the plan, *though liable*, would be judgment proof. Thus, for most plaintiffs the sensible route is to use § 1132(a)(2) to get the money in the first instance from a solvent party liable to make good on the loss, not from the plan itself. This does not, however, change the underlying nature of Graden's claim as one for benefits; it merely changes his mechanism for recovery.

Relying on some language in *Sommers*, Conexant also argues that Graden's claim is too speculative or difficult to calculate to be a claim for benefits. Indeed, it is true that the *Sommers* Court opined that someone asserting a claim for an "unascertainable amount" would not state a claim for benefits. 883 F.2d at 350. This portion of *Sommers*, however, is incorrect. As

Judge Posner put it in *Harzewski*, "there is nothing in ERISA to suggest that a benefit must be a liquidated amount in order to be recoverable." 489 F.3d at 807.

Moreover, here the amount is hardly unascertainable. Rather, the measure of damages is the amount that affected accounts would have earned if prudently invested.

In determining what the Plan would have earned had the funds been available for other Plan purposes, the district court should presume that the funds would have been treated like other funds being invested during the same period in proper transactions. Where several alternative investment strategies were equally plausible, the court should presume that the funds would have been used in the most profitable of these.

Donovan v. Bierwirth, 754 F.2d 1049, 1056 (2d Cir.1985). Thus, if Graden succeeds on the merits, the District Court will look to the prudent investment alternatives that the Conexant plan offered during this period to determine what the Conexant Stock Fund B investors would have earned but for Conexant's breach.

Following the analysis in Part II, Graden's status as a participant flows naturally from the text of ERISA. Still, policy concerns strengthen our conviction that we have properly interpreted the statute. It is worth considering the ramifications of holding that former employees in Graden's situation are not participants. Such a holding would allow an employer who had mismanaged individual account plan assets to avoid liability by cashing out the participants. By paying them the then-stated balance of their accounts when cashed out, the employer would, under Conexant's logic,

pay out all of the participants' "benefits," thereby ensuring that none would have standing to sue for its breach of duty. Conexant's protestations notwithstanding, we find it hard to believe that Congress intended such a result. Indeed, we have held that ERISA's legislative history indicates that its standing requirements should be construed broadly to allow employees to enforce their rights. *Leuthner*, 454 F.3d at 128 (citing S. REP. NO. 93-127, at 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4871).

We pose another hypothetical: assume that an active participant in the Conexant plan brings a § 1132(a)(2) action on behalf of the plan and successfully recovers the loss caused by Conexant's breach (again, assuming, without deciding, there is such a breach). The loss to the plan would necessarily include losses suffered by former employees who were invested in the Conexant Stock Fund, and the amount of recovery would have to make good on those losses. Otherwise, the plan would not recover the whole of its loss, which, according to plain text of § 1132(a)(2), is its right. Thus, the plan would recover money that could only properly be allocated to people no longer in the plan. This would be a serious problem for an individual account plan because all of the plan's money is allocated to individual accounts; thus if the plan recovers money allocable to individuals who no longer have accounts and cannot get standing for the imposition of a constructive trust in their favor, it is unclear what the plan would be entitled to do with the money. Perhaps the plan would try to allocate it to current account-holders *pro rata*, but if we are to take the trust-law analogy seriously, then the recovered

funds must go to the people actually sustaining losses.[14] The sensible holding, therefore, is that former employees whose benefits would be made whole by a restoration of losses to the plan are participants with standing to sue on behalf of the plan and take part in any recovery.

Amicus National Association of Manufacturers urges that we affirm because of the ramifications of labeling someone like Graden a "participant." The specific concern is that it will require employers to make costly disclosures to people who, as far as the employer is concerned, are cashed out. This worry overstates, we believe, the concern. First, the inclusion of ostensibly cashed-out employees in the category of participants derives from the text of the definition and from *Firestone*, 489 U.S. at 103, 109 S.Ct. 948, not from our case. It was *Firestone* that held that anyone asserting a colorable claim for benefits is a participant. *Id.* In this case, we merely clarify that a benefit encompasses both miscalculations of a person's entitlement and reductions traceable to fiduciary malfeasance.

Second, we cannot imagine holding a plan fiduciary liable for failing to provide information to someone who, as far as the fiduciary knows, is cashed out. Informational obligations may reattach once the fiduciary is on notice that the person is asserting a claim for benefits, *see Daniels*, 263 F.3d at 78-79, but until then, it seems within the fiduciary's discretion to

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[14] As we explained in Part II, in trust-law derivative actions, only those whose beneficial interests were harmed may sue on behalf of the trust, for it is they who share in any recovery.

send reports only to those participants known to the fiduciary to consider themselves as such.

IV. Conclusion

In sum, we hold that, when determining participant standing under ERISA, the relevant inquiry is whether the plaintiff alleges that his benefit payment was deficient on the day it was paid under the terms of the plan and the statute. If so, he states a claim for benefits, which, if colorable, makes him a participant with standing to sue. If, on the other hand, he seeks extracontractual damages or benefits that never vested, then he is not a participant, and a federal court cannot entertain his suit. Here, because Graden merely seeks the full amount of benefits owed him given Conexant's alleged breach of its duty of prudent investment, he has standing to maintain this suit, and we therefore vacate the District Court's order dismissing Graden's complaint for lack of statutory standing and remand for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-2337

HOWARD GRADEN, individually and on behalf of all others similarly situated,
Appellant

v.

CONEXANT SYSTEMS INC.; DWIGHT W. DECKER; ARMANDO GEDAY; ROBERT MCMULLAN; MICHAEL VISHNY; PLAN COMMITTEE MEMBERS; JOHN DOES 1– 10 fictitious names; J. SCOTT BLOUIN; BALAKRISHNAN S. IYER; DENNIS E. O'REILLY; KERRY K. PETRY; BRADLEY W. YATES

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 05-cv-00695)
District Judge: Honorable Stanley R. Chesler

Argued April 19, 2007

Before: McKEE, AMBRO and MICHEL[1],
Circuit Judges

JUDGMENT

This cause came on to be heard on the record before the United States District Court for the District of New Jersey and was argued on April 19, 2007.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated March 31, 2006 is hereby vacated and remanded for further proceedings. All of the above in accordance with the opinion of this Court. Costs taxed against the Appellees.

ATTEST:

/s/Marcia M. Waldron
Clerk

Dated: July 31, 2007

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[1] Honorable Paul R. Michel, Chief Judge, United States Court of Appeals for the Federal Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-2337

HOWARD GRADEN, individually and on behalf of all others similarly situated,
Appellant

v.

CONEXANT SYSTEMS INC.; DWIGHT W. DECKER; ARMANDO GEDAY; ROBERT MCMULLAN; MICHAEL VISHNY; PLAN COMMITTEE MEMBERS; JOHN DOES 1– 10 fictitious names; J. SCOTT BLOUIN; BALAKRISHNAN S. IYER; DENNIS E. O'REILLY; KERRY K. PETRY; BRADLEY W. YATES

(D.C. Civil Action No. 05-cv-00695)

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN and MICHEL,* Circuit Judges

SUR PETITION FOR *EN BANC* REHEARING

The petition for rehearing filed by Appellees having been subbmitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who

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* Honorable Paul R. Michel, Chief Judge, United States Court of Appeals for the Federal Circuit, sat by designation, limited to panel vote only.

concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: September 5, 2007
par/cc: All Counsel

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

September 14, 2007

No. 06-2337

Howard Graden

v.

Conexant Systems Inc., et al

(NJ DC 05-cv-00695)

Present:: McKEE, AMBRO and MICHEL, Circuit Judges

Motion by Appellees To Stay the Mandate for 90-day Period Within Which They May File a Petition for Writ of Certiorari in the Supreme Court of the United States.

/s/Phillis Ruffin
Phyllis Ruffin 267-299-4918

ORDER

The foregoing motion by Appellees to Stay the Mandate for 90-day period is denied.

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: October 15, 2007
par/cc: J.J.N., Esq.
E.G., Esq.
J.H., Esq.
J.E.S., Esq.
J.S.A., Esq.
G.B.R., Esq.
R.A.R., Esq.
D.A.S., Esq.
R.F.T., Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Hon. Stanley R. Chesler
Civ. No. 05-0695

HOWARD GRADEN, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

CONEXANT SYSTEMS, INC., DWIGHT W. DECKER, ARMANDO GEDAY, MICHAEL VISHNY, BALAKRISHNAN S. IYER, ROBERT McMULLAN, DENNIS E. O'REILLY, J. SCOTT BLOUIN, and KERRY K. PETRY.,

Defendants.

ORDER

CHESLER, District Judge

THIS MATTER comes before the Court on Defendants' Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(6)(1), 12(6)(6), 8(a) and 9(b); and the Court having considered the submissions of the parties; for the reasons expressed in the Opinion filed herewith; and for good cause shown;

IT IS this 31st day of March 2006,

ORDERED that Defendants' Motion to Dismiss (docket item # 20) is GRANTED; and it is further

ORDERED that this case is CLOSED and any pending motions are dismissed as moot.

/s/ Stanley R. Chesler

United States District Court,
D. New Jersey.

HOWARD GRADEN, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

CONEXANT SYSTEMS, INC., DWIGHT W. DECKER, ARMANDO GEDAY, MICHAEL VISHNY, BALAKRISHNAN S. IYER, ROBERT MCMULLAN, DENNIS E. O'REILLY, J. SCOTT BLOUIN, and KERRY K. PETRY.,

Defendants.

No. Civ. 05-0695.

March 31, 2006.

Lisa J. Rodriguez, Trujillo Rodriguez & Richards, LLP, Haddonfield, NJ, for Plaintiff.

Gregory B. Reilly, Deborah A. Silodor, Lowenstein Sandler, PC, Roseland, NJ, for Defendants.

OPINION

CHESLER, District Judge

THIS MATTER comes before the Court on Defendants' Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), 8(a) and 9(b). As will be discussed below, the Court concludes that Plaintiff lacks standing to sue under the provisions of the Employee Retirement Savings Act of 1979

("ERISA") and, therefore, GRANTS Defendants' Motion to Dismiss.

I. BACKGROUND

Plaintiff is a former participant in the Conexant Retirement Savings Plan (the "Plan") who directed some of his investments into Conexant stock. His central allegation is that Defendants violated their fiduciary duty to Plan participants by continuing to allow Conexant stock to be offered as an investment option to participants in the defined contribution plan and encouraging Plan participants to invest in Conexant stock, despite the stock's precipitous decline following Conexant's merger with Globespan Virata, Inc. ("Globespan").

Plaintiff claims that investments in Conexant stock "became imprudent as a result of poor financial and operating performance of the Company." (Am.Compl., ¶ 7(c).) Specifically, the Amended Complaint alleges that Conexant was a poor investment option for the plan because of problems with Conexant's merger with Globespan. (*Id.* at ¶ 37.) Plaintiff asserts that Defendants made false and misleading statements about the status of the Globespan merger and about the merged company's financial prospects. (*Id.* at ¶¶ 4-5, 37-62.) The Amended Complaint further alleges that these purported misstatements artificially inflated the price of Conexant stock, which "declined precipitously" when Conexant lowered its financial projections. (*Id.* at ¶ 5.)

The Amended Complaint contains five counts: Counts I and II assert a breach of fiduciary duty due to the failure to prudently and loyally manage Plan

assets; Count III alleges a breach of fiduciary duty due to the failure to provide complete and accurate information to the Plan participants and beneficiaries; Count IV alleges a breach of fiduciary duty due to an alleged failure to monitor other Plan fiduciaries; and Count V alleges a breach of fiduciary duty resulting from transactions that were prohibited under ERISA § 406.

Plaintiff seeks to represent a class of participants in or beneficiaries of the Plan from March 1, 2004 through the present (the "putative class period"). (Am.Compl.¶¶ 2, 15, 76.) Plaintiff was a Conexant employee until September 3, 2002. (Rosen Decl., Ex. A (Graden Employment Record).)[1] Plaintiff liquidated the balance of his Plan account in October 2004, four months before filing the original complaint in this action and ten months before filing the Amended Complaint. (Am. Compl., ¶ 15; Rosen Decl., Ex. B (Graden 401(k) Plan Statement for October 2004).) The Amended Complaint is brought against Conexant, the Plan sponsor, and various Conexant officers and directors who are alleged to be fiduciaries of the Plan under ERISA.

As mentioned earlier, the Plan is a "defined contribution" or "individual account" plan within the

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[1] In evaluating a motion to dismiss under rule 12(b)(6), a court may consider any document, such as Graden's employment record, that is "integral to or explicitly relied upon on in the complaint" as well as any "undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if plaintiff's claims are based on the document." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir.1997) (internal citations omitted); see also *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442 (3d Cir.2003).

meaning of ERISA § 3(34), 29 U.S.C. § 1002(34). (Am.Compl., ¶ 25.) The Plan provides for individual accounts for each Participant, and benefits are payable based on the amounts contributed to these accounts, adjusted for any investment gains or losses. (*Id.*) Participants contribute a certain percentage of their salary to the Plan on a pre-tax basis. These amounts are invested among the Participant's choice of investment options available under the Plan. (*Id.* at ¶¶ 26-27.) Among the investment options provided by the Plan is a fund consisting solely of Conexant stock.

All of Plaintiffs' breach of fiduciary duty claims revolve around Defendants' alleged action and inaction with regard to the Conexant stock in the plan. Defendants, in their motion to dismiss, contend that the allegations in Plaintiffs' Amended Complaint fail to assert a viable claim for any breach of fiduciary duty by any defendant. The Court concludes that none of these issues need be reached because Plaintiff is not a plan participant under ERISA and, therefore, does not have standing to sue for a breach of fiduciary duties under ERISA § 502(a).

II. DISCUSSION

To have standing to sue under ERISA § 502(a), a plaintiff must be "a participant, beneficiary, or fiduciary" of a plan. 29 U.S.C. § 1132(a). A "participant" is defined by ERISA as "an employee or former employee of an employer ... who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employ." 29 U.S.C. § 1002(7). "In order to establish that he or she [is eligible or] 'may become eligible' for benefits, a claimant must have a colorable claim that

(1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

Defendants move to dismiss Plaintiff's claims on the ground that he is no longer an employee or Plan participant and, therefore, is not a "participant" under ERISA, 29 U.S.C. § 1002(7). Accordingly, Defendants assert that Plaintiff lacks standing to bring breach of fiduciary duty claims on behalf of the Plan under ERISA, 29 U.S.C. § 1132(a)(2).

The standing of the Plaintiff to bring suit on behalf of the Plan for "appropriate relief" under ERISA hinges on the question of whether he is a "participant" under ERISA. 29 U.S.C. § 1002(7). "The requirement that a claimant be a 'participant' is a subject matter jurisdiction requirement as well as a standing issue." *Katzoff v. Eastern Wire Products Co.*, 808 F.Supp. 96, 98 (D.R.I.1992) (citations omitted). A party is a "participant" under ERISA if he has "either a colorable claim to vested benefits in the Plan or a reasonable expectation of returning to employment at [his former employer where he would again be covered by the Plan]." *Shawley v. Bethlehem Steel Corp.*, 989 F.2d 652, 655-56 (3d Cir.1993) (citing *Sladek v. Bell System Management Pension Plan*, 880 F.2d 972, 979 (7th Cir.1989)).

Plaintiff makes no claim that he has any reasonable expectations of returning to Conexant as an employee. His argument is that he has a "colorable claim to vested benefits" that entitle him to standing. In essence, Plaintiff asserts that he has not received all the benefits to which he is entitled, and is seeking a

recovery to the Plan of the losses caused by the alleged breaches of fiduciary duty. *See Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985) (holding that recovery for ERISA breaches inure to the benefit of the Plan as a whole). These benefits would be paid first to the Plan and then distributed to the Plaintiff class as benefits through their Plan accounts.

The problem with the Plaintiff's claim is that, since he has no reasonable expectation of returning to work as an employee, he must have a "colorable claim to *vested* benefits" to have standing to proceed with his case. *Shawley*, 989 F.2d at 655-56 (emphasis added). As will be discussed below, what he is seeking is not, however, a "vested benefit" under ERISA.

The Third Circuit has definitively held that "damages stemming from [an] alleged breach of fiduciary duty does not constitute a "benefit" within the meaning of [29 U.S.C.] § 1002(8)." *Daniels v. Thomas and Betts Corp.*, 263 F.3d 66, 77 (3d. Cir.2001) (citing *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.1986). This Court has reached a similar conclusion under facts which are close to those presented in this case. *See In re RCN Litigation*, 2006 WL 753149, *14 (D.N.J. Mar. 21, 2006); *McFarland v. Yegan Holdings Corp.*, 1989 U.S. Dist. Lexis 16965, *9-11 (D.N.J. Oct. 6, 1989).

Thus, the key question is whether Plaintiff has a colorable claim to vested benefits or is merely seeking damages. A good deal of light on this issue is shed by the Complaint itself. It indicates that Plaintiff seeks to have Defendants make good on all losses "including lost return on investments that would have resulted from

prudent and loyal investment of the Plan's assets," and require Defendants to restore "the full value of all contributions used to make such investments, plus the return that would have been obtained had the assets been prudently invested in the best performing alternative investment in the Plan." (Am. Compl. p 51, ¶¶ 3, 5.)

As the Fifth Circuit in *Sommers Drug Store Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345 (5th Cir.1989) noted:

> The distinction between "benefits" and "damages" is not clear. This is in part attributable to use of words with overlapping meaning to describe mutually exclusive categories. The statute simply grants rights of recovery only to a distinct and limited type of claim which itself is no more than a suit for damages, albeit personally suffered because participants should have been paid under the plan but were not. Clearly, a plaintiff alleging that his benefits were wrongly computed has a claim for vested benefits. Payment of the sum sought by such a plaintiff will not increase payments due him. On the other hand, a plaintiff who seeks the recovery for the trust of an unascertainable amount, with no demonstration that the recovery will directly effect payment to him, would state a claim for damages, not benefits.
>
> *Id.* at 349-350.

In *Sommers*, the court concluded that where plaintiffs claimed that defendant fiduciaries had

redeemed their shares of stock in an ESOP at less than fair market value, plaintiffs had a claim for vested benefits because they were essentially suing for benefits that were wrongfully withheld. In *Hargrave v. TXU Corp.*, 392 F.Supp.2d 785 (N.D.Tex.2005), the court relied on Sommers analysis to conclude that breach of fiduciary duty claims, virtually identical to those asserted here, constituted damages claims. In reaching this holding, the *Hargrave* Court conducted the following analysis:

Plaintiffs' claims in this case are readily distinguishable from the claims made in *Sommers*. In *Sommers*, the plaintiffs argued that the full market value of the plan assets was greater than the amount they received when the assets were distributed. *Sommers*, 883 F.2d at 350. Stated another way, the total value of the plan assets was a certain amount that was calculable, and the plaintiffs argued that they did not receive that full calculable value because the defendants held back some of the proceeds for themselves. The *Sommers* plaintiffs sued to recover the rest of the benefits that were wrongfully withheld. See *Id.* Thus, the Fifth Circuit concluded that the plaintiffs' claims were in fact for vested benefits rather than for damages. *Id.*

The named Plaintiffs in this case, by way of contrast, do not allege that the Defendants held back a portion of the benefits of the plan. Rather, they argue that the amount in the entire plan was too small. Specifically, Plaintiffs allege that Defendants' investment in TXU stock resulted in an overall diminution of plan assets, which were then distributed to the Plaintiffs. The allegation is not that benefits were withheld, but that there should have been more

benefits to go around. This argument states a claim for "a sum that possibly could have been earned" if Defendants had made prudent investment decisions with respect to plan assets. *See Yancy*, 768 F.2d at 709. The named Plaintiffs have already received all the benefits that accrued under their Thrift Plan accounts. They are now seeking additional damages that *might have* accrued but for Defendants' alleged misconduct. See *Id.* These additional damages are speculative and cannot be considered as vested under ERISA. See *Id.*

Unlike *Sommers*, the named Plaintiffs' argument does not resemble an allegation that benefits were simply miscalculated and cannot be construed as a claim for vested benefits. On the contrary, Plaintiffs are demanding that Defendants make good to the Thrift Plan for the *losses sustained* as a result of the investments in TXU stock. This argument most closely resembles a claim for damages to the plan.

Id. at 789-90 (emphasis in original).

This Court believes that the *Hargrave* Court's analysis is correct and applies to this case. As much as one might wish to engage in semantic gymnastics, there is simply no way to conclude that a claim which seeks reimbursement for the "lost return on investments that would have resulted from prudent and loyal investment of plan assets" is one for vested benefits. Nor is there any way to conclude that a claim for "the return that would have been obtained had the assets been prudently invested in the best performing alternative investment in the plan" is anything other than a claim for damages. Such allegations seek to claim a sum that could possibly be earned if the Defendants did not commit the alleged breaches of fiduciary duty.

Additional damages that might have accrued, however, are "speculative and cannot be considered as vested under ERISA." *Hargrave*, 392 F.Supp.2d at 790; *accord Lalonde v. Textron, Inc.*, 2006 WL 519671, *5 (D.R.I. March 1, 2006).

The difference between what the Plaintiff's account *might have* earned and what it actually earned is not a benefit that is promised for, or promised under, the terms of the Plan. The remedy being sought here is not the payment of a vested benefit, but rather a monetary damage amount for an alleged breach of fiduciary duty. See *Sommers*, 883 F.2d at 350. The Plaintiff received all the benefits due to him when he left Conexant's employment and withdrew from the Plan. "At that point, without the reasonable expectation of returning to [Conexant] as [an] employee[ ], and absent a colorable claim to vested benefits, [he] ceased to be [a] participant[under ERISA." *Lalonde*, 2006 WL 519671 at *5.

The Court recognizes that there are serious and substantial policy arguments which can be made in favor of granting plaintiff standing in a case such as this. *See, e.g., Rankin v. Rots*, 220 F.R.D. 511 (E.D.Mich.2004), and *In Re Mut. Funds Inv. Litig.*, 403 F.Supp.2d 434 (D.Md.2005). The primary argument presented in these opinions is that to find that such former participants lack standing "would permit [defendants] to exclude potential class members by simply paying them their vested benefits. ERISA should not be interpreted to circumvent a plaintiffs' recovery in this way." *In Re Mut. Funds*, 403 F.Supp.2d at 442 (quoting *Rankin*, 220 F.R.D. at 514).

The problem with this approach is that it renders the statutory standing provision a nullity. In effect these courts conclude that, because interpreting the statute as written would deny plaintiffs a remedy, the statute, and its definitive interpretation by the Supreme Court in *Firestone Tire & Rubber*, should be either ignored, or that suits which clearly seek damages should be transformed by judicial legerdemain into suits for "vested benefits." This Court is satisfied that neither is a proper role for this Court.[2]

Plaintiff also cites to the recent Third Circuit decision *In re Schering-Plough Corporation ERISA Litigation*, 420 F.3d 231 (3d Cir.2005) to support his claim that former Plan participants have standing to pursue ERISA claims against the Plan's fiduciaries for imprudently managing the Plan's assets. The holding in Schering, however, is not at issue in the current case. It is well established that any claim for breach of fiduciary duty under ERISA must seek relief for the plan as a whole, rather than for individual plan participants. *See Byrd v. Reliance Standard Life Ins.*

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[2] The Court notes that a number of cases have developed an exception to the general rule that a person who terminates his right to belong to a plan cannot be a "participant" in the plan. Specifically, if the employer's breach of fiduciary duty causes the employee to either give up his right to benefits or to fail to participate in a plan, then the employee has standing to challenge that fiduciary breach, *Swinney v. Gen. Motors Corp.*, 46 F.3d 512, 519 (6th Cir.1995). Since no such assertion has been made in this case, the Court need not decide whether or not this exception is indeed warranted. *See Adamson v. Armco Inc.*, 44 F.3d 650, 655 (8th Cir.1995) (exception only applies when fiduciary's breach of duty deprives plaintiff of participant status-not where loss of status results from plaintiff's own actions).

Co., 160 Fed. Appx. 209, n4 (3d Cir.2005) (on ERISA claims for breach of fiduciary duty, "relief is available to the plan, not to individual plan participants") (citing *McMahon v. McDowell*, 794 F.2d 100, 109 (3d Cir.1986); *Alexander v. Whitman*, 114 F.3d 1392, 1397 (3d Cir.1997); *Hein v. Fed. Deposit Ins. Corp.*, 88 F.3d 210, 223 (3d Cir.1996); *Ream v. Frey*, 107 F.3d 147, 151 (3d Cir.1997); *Haberern v. Kaupp Vascular Surgeons, Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1501 (3d Cir.1994)); *In re RCN Litigation*, 2006 WL 753149 at *13-14; *Compton Press, Inc. Employees' Profit Sharing Retirement Plan v. Granada Investments, Inc.*, 1992 WL 566329, *9 (D.N.J. Nov.23, 1992) (holding that a "suit against a benefit plan fiduciary for breach of fiduciary duties may only be brought for the benefit of the plan") (citations omitted).) Under Schering, the fact that a given plan is segregated into individual participant accounts does not mean that a loss to a particular account (or group of accounts) is not also a loss to the Plan as a whole. *Schering*, 420 F.3d at 237. Accordingly, the *Schering* Court overturned a district court's holding that prevented plaintiffs from pursuing a derivative action on behalf of an employees' savings plan on the grounds that the plaintiffs were seeking compensation for losses inflicted on only a subset of the plan's accounts and that the plaintiffs were seeking an allocation of damages among individual plan participants' accounts in proportion to the accounts' losses. *Id.* at 234. The *Schering* Court held that "the fact that damages paid to [a] Savings Plan for breaches of fiduciary duties will also indirectly benefit its participants does not bar a derivative action under §§ 1109 and 132(a)(2)." *Id.* at 241 (citing *Smith v. Sydnor*, 184 F.3d 356, 363 (4th Cir.1999).

Schering holds that participants may seek damages on behalf of the Plan for alleged breaches of fiduciary duty that had an adverse financial impact to only a subset of the Plan's accounts (namely, those with investments in Conexant securities). It also holds that participants may seek damages on behalf of the Plan which may be appropriately allocated to individual Plan participants' accounts. Both of these issues are precluded by the Schering decision. The issue of whether a former employee has standing, under the requirements of *Shawley* to bring suit on behalf of RCN's savings plan, however, was not addressed by the *Schering* Court.

III. CONCLUSION

In short, this Court agrees with the *Lalonde* Court "that the distinction between damages and vested benefits is real and the concepts must not be conflated in order to expand participant standing beyond what Congress provided in § 1002(7).2006 WL 51967, at *5. For the foregoing reasons, the Court GRANTS Defendants' Motion to Dismiss. An appropriate form of order will follow.

D.N.J., 2006.

29 U.S.C. § 1002.

29 U.S.C. § 1002. Definitions.

For purposes of this subchapter:

***

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

***

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

29 U.S.C. § 1132

29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

***

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 06-2337

HOWARD GRADEN, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

CONEXANT SYSTEMS, INC.; DWIGHT W. DECKER; ARMANDO GEDAY; ROBERT MCMULLAN; MICHAEL VISHMY; S. SCOTT BLOUIN; BALAKRISHNAN S. JYER; DENNIS E. O'REILLY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY,
HONORABLE STANLEY R. CHESLER
USDC NO. 05-0695

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE OF DISTRICT COURT RULING

Jan S. Amundson
National Association of
Manufacturers
1331 Pennsylvania Avenue, N.W.
6th Floor
Washington, DC 20004
Tel: (202) 637-3000

DISCLOSURE STATEMENT UNDER RULE 26.1

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for the National Association of Manufacturers (NAM) hereby certifies that the NAM is a trade association. The NAM has no parent companies, subsidiaries or affiliates that have outstanding securities in the hands of the public. While members of the NAM have outstanding securities in the hands of the public, these members are not parent companies, subsidiaries or affiliates of the NAM, and no publicly held company has any ownership interest in the NAM.

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ISSUE PRESENTED

Whether the District Court correctly held that Plaintiff lacked standing to assert claims as a participant on behalf of the plan under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).

INTEREST OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAMs mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to American's economic future and living standards. The NAM's members sponsor both defined benefit and defined contribution pension plans covered under ERISA, and the members' employees and retirees constitute a significant percentage of the more than 100 million participants in such plans. The NAM is therefore concerned that ERISA be interpreted to promote its fundamental goals of fostering the growth of employee benefit plans and ensuring the retirement income security of American workers.

The position advocated by the Plaintiff-Appellant in this case would undermine these purposes by increasing the costs of pension plan administration without providing any additional security for plan participants. The NAM presents this brief to highlight the adverse practical consequences of allowing suits by

individuals who have left covered employment and have received all of the benefits promised by their plans. Counsel for the Plaintiff and Defendants have consented to the filing of this brief.

STATEMENT OF FACTUAL AND LEGAL BACKGROUND

The Employee Retirement Income Security Act of 1974 ("ERISA") is a federal statute that comprehensively regulates pension and welfare benefit plans sponsored by private employers. ERISA imposes significant duties on persons that sponsor and administer employee benefit plans, including duties of prudence and loyalty to plan participants. It also imposes an "elaborate scheme' of reporting and disclosure, requiring plan administrators to file annual reports with the government and to make periodic disclosures to plan participants. *See Curtiss- Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995); 29 U.S.C. § 1022-1024.

ERISA provides a "reticulated" scheme of public and private enforcement to ensure compliance with its substantive requirements. *See generally Massachusetts Mw. Life Insurance Co. v. Russell*, 473 U.S. 134, 146 (1985); 29 U.S.C. § 1132. Each of the nine causes of action set forth in section 502(a) of ERISA specifically enumerates who may bring a suit and what relief may be granted. 29 U.S.C. § 1132(a). In general, section 502(a) authorizes only the Secretary of Labor, plan "participants" and "beneficiaries", and plan fiduciaries to bring suit under this carefully crafted enforcement scheme.

Amicus adopts the Defendants-Appellees' statement of the facts, which show that Plaintiff liquidated the balance of his Plan account several months prior to filing this lawsuit.

ARGUMENT

Construing the defined term "participant" to include Plaintiff would impose unnecessary burdens and costs on plans and their true participants.

If Plaintiffs who have liquidated their Plan accounts are considered "participants" in such plans, pension plans and the employers who sponsor them will face a substantial new burden, one that is wholly at odds with the language and structure of the statute. Plans and their sponsors maybe obliged to undertake a multitude of recordkeeping and disclosure duties with respect to persons who have severed all ties with a plan — persons who are commonly understood to have no further interest in or relationship with the plan. Imposing such duties on employers and plan administrators would unnecessarily increase the costs of plan administration and diminish the value of plan benefits for those employees who continue in covered service.

Over the past three decades, defined contribution plans, such as 401(k) plans, have become the dominant vehicle for providing retirement income security to the nations workforce. According to a July 2006 Department of Labor study analyzing data for 2002 (the most recent year for which complete data was available), employers sponsored more than 388,000 defined contribution 401(k) plans, covering 43 million

active participants and an additional 10 million inactive participants. According to the Labor Department, "active participants include any workers currently in employment covered by a plan and who are earning or retaining credited service under a plan. Active participants also include nonvested former employees who have not yet incurred a break in service." Participants who are not regarded as "active participants" comprise "retired and separated vested participants not yet in pay status." U.S. Department of Labor Employee Benefits Security Administration, "Private Pension Plan Bulletin: Abstract of 2002 Form 5500 Annual Reports' (Version 1.0 July 28, 2006) at 39 and n.2 and 3; www.dol.gov/ebsa/PDF/2002pensionplanbulletin.PDF. Plainly absent from the Department's participant headcount are former employees who have severed their ties with their employers and have closed out their interests in their employers' plans. This omission is not an oversight. In reality, treating former employees who have no visible interest in a plan as continuing "participants" in the plan would create a host of costly problems for ongoing plan administration while doing nothing to enhance the security of a plan's promise to provide benefits.

The Defendants-Appellees have brought to this Court's attention the substantial case law explaining why former employees do not have standing to sue under section 502(a) of ERISA. The NAM joins in these arguments and will not repeat them here. Instead, the NAM will examine the pitfalls that would bedevil the administration of employee benefit plans if the opened-ended interpretation of ERISA's definition of "participant" were adopted by this Court. The starting point is two familiar principles of statutory

construction. First, "[a] definition which declares what a term 'means' . excludes any meaning that is not stated." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (quoting 2A C. Sands, Statutes and Statutory Construction § 47.07 (4th ed Supp. 1978). Second, "[w]hen the same word is used in the same section of an act more than once, and the meaning is clear in one place, it will be assumed to have the same meaning in other places.' *US. v. Ivic*, 700 F.2d 51,60 (2d Cir. 1983).

Section 3(7) of ERISA provides that "[t]he term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan. . ." The construction given to this definition should control wherever the term appears in the statute. In Title I of ERISA, the term appears throughout, and it is central to the operation of virtually all of the duties and obligations that the statute prescribes. For example, a plan administrator is required to furnish periodically 'to each participant covered under the plan' a copy of the plans summary plan description. ERISA § 101(a), 29 U.S.C. § 1021(a); ERJSA § 104(b)(l), 29 U.SC. § 1024(b)(l). The administrator must also provide a number of other notices to "participants" upon the occurrence of various events, such as a plan's failure to satisfy minimum funding standards or a transfer of excess assets out of a plan. ERISA § 10 l(d)(1) and (e)(l).

Similarly, plan administrators are required to file annual reports with the government, including an actuarial statement setting forth "[t]he number of participants and beneficiaries, both retired and nonretired, covered by the plan." ERISA § 103(d)(4), 29

U.S.C. § 1023(d)(4). Plan administrators are required to furnish annually a summary of the information contained in this report "to each participant." ERISA § 104(b)(3). Administrators are also required to provide additional documents "upon written request of any participant . . ." ERISA § 104(b)(4).

Plan administrators who fail to satisfy these reporting and disclosure obligations face the prospect of significant civil penalties, ranging from $100 per day to $1,000 per day until the failure is rectified. ERISA § 502(c), 29 U.S.C. § 1132(c).

The cost of performing these reporting and disclosure functions is significant. A study performed for the Department of Labor in 1998 estimated that the annual average cost per participant of performing these functions in individual account 401(k) plans ranged from $34 to $42, depending on the size of the plan. Pension and Welfare Benefits Administration: Study of 401(k) Plan Fees and Expenses (April 13, 1998), § 4.2.2.; www.dol.gov/ebsalpdf/401kRept.pdf.

It is readily apparent that a broad construction of the term participant creates a dilemma for employers and plan administrators in carrying out their various obligations. Every former employee who has cashed out his or her interest in the plan may continue to be a "participant" in the plan because such an individual may at some future time file suit seeking some form of monetary relief characterized as a "benefit" under the plan. Employers and plan administrators may be compelled to keep track of these individuals and to provide them with the information that ERISA requires for each "participant," simply to avoid the potential for

the imposition of civil penalties for reporting and disclosure failures.

The costs of the additional recordkeeping and reporting for a population of former employees who for all intents and purposes have completely severed their ties with the employer and its 401(k) plan could over time become significant.

And, ironically, these additional costs would be borne, at least in part, by the real participants in the plan. In many cases, especially among larger plans, the administrative costs of recordkeeping and reporting are charged against plan assets and allocated to each individual participant's account. *See* Study of 401(k) Plan Fees and Expenses, § 3.6. Because former employees who have cashed out their entire interest in the Plan obviously do not continue to have accounts in the Plan, the costs associated with keeping track of them and providing Plan materials to them would be shifted entirely to the real participants in the Plan.

In addition to the unwarranted burdens and costs that could be imposed by a broad construction of the term "participant,' it can also be easily seen that adopting an open-ended construction is at odds with the terminology typically contained in plan documents and their associated summary plan descriptions. The drafters of such documents share a common understanding that persons who have severed ties with a plan's sponsoring employer and who have no reasonable expectation of receiving any benefits under the plan are not 'participants." That understanding is reflected throughout plan documents, which typically advise that administrative fees are charged against participants' accounts, that personalized account

statements will be distributed annually, and that an employee who leaves employment may receive a "final distribution" from his or her accounts. These provisions make sense only if one construes cashed-out former employees as not being Plan participants.

A typical Plan document sets forth various rules governing such things as changes in employment status that depend for their operation on the accepted meaning of the term participant. Plans contain a host of specific rules governing changes in a "participants status. These and other rules governing such things as forfeitures and reinstatements of non-vested portions of an account balance and the designation of beneficiaries would be rendered absurd by an open-ended construction of participant.

It can readily be seen that there is no compelling reason to adopt an interpretation of the term participant that would impose a host of burdens on plans and their real participants. Likewise, recognizing that former employees who have received all of their benefits under a plan have no standing to sue plan fiduciaries would certainly not undermine the vigorous enforcement of ERISA's requirements. Many, if not all, of the actual, ongoing participants in a plan are in a position to bring an action challenging the conduct alleged in this case. In short, there is no shortage of genuine plaintiffs with standing to bring any appropriate action.

CONCLUSION

The National Association of Manufacturers, as amicus curiae, respectfully submits that the judgment of the District Court be affirmed.

Dated: October 10, 2006

/s/Jan Amundson
Jan S. Amundson
National Association of Manufacturers
1331 Pennsylvania Avenue, NW
6th Floor
Washington, DC 20004
Tel: (202) 637-3000

COMBINED CERTIFICATIONS

1. Certification of Bar Membership

I hereby certify that Jan S. Amundson, counsel for amicus curiae National Association of Manufacturers, is a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Certification of Service

I hereby certify that on October 10, 2006, two copies of the foregoing brief were provided via first class U.S. mail to each of the following individuals:

Robert I. Harwood
Jeffrey M. Norton
Wechsler Harwood LLP
488 Madison Avenue, 8th Floor
New York, New York 10022

Lisa J. Rodriguez
Trujillo Rodriguez & Richards, LLP
8 Kings Highway West,
Haddonfield, New Jersey 08033

Elizabeth S. Goldberg
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., NW
Room N-2700
Washington, DC 20210

Jay E. Sushelsky
AARP Foundation Litigation
601 E Street NW
Washington, DC 20049

Richard A. Rosen
Robyn F. Tarnofsky
Kerry L. Quinn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, New York 10019-6064

Gregory B. Reilly
Deborah Silodor
Lowenstein Sandier PC
65 Livingston Avenue
Roseland, New Jersey 07068

3. Certification of Word Count

I hereby certify that this brief complies with the type-volume limitation of Fed. App. R. 32(a)(7)(B). As counted by Microsoft® Word 2002 document summary tool, the brief contains 1,999 words, excluding the parts of the brief exempted by Fed. App. R. 32(a)(7J(B)(iii). The brief is printed using the Times New Roman font, 14-point.

4. Certification of Identical Compliance of Briefs

I hereby certify that the text of the electronic brief being provided to the Court as a .pdf document and the text of the paper version of the brief are identical.

5. Certification of Virus Check

I hereby certify that a virus check was performed on the electronic brief and no viruses were found.

/s/ Jan Amundson
Jan S. Amundson